No. 391.
Brf. of Pflaum, Ach, Rothschild & Levinson for Appts.
Office Supreme Court U.S.
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JAMES H. MCKENNEY
Clerk

Supreme Court of the United States.

Filed Jan. 15, 1901.

OCTOBER TERM, A. D. 1900.

No. 391.

In the matter of **AUGUST FRANK, JOSEPH FRANK and LOUIS FRANK, trading as FRANK BROS., Bankrupts**

JOHN T. PIRIE, ROBERT SCOTT, GEORGE SCOTT, ANDREW McLEISH, SAMUEL C. PIRIE, JOHN E. SCOTT AND JAMES GRASSIE, COPARTNERS TRADING AS CARSON, PIRIE, SCOTT & COMPANY,

Appellants,

vs.

THE CHICAGO TITLE & TRUST COMPANY, TRUSTEE,

Appellee.

BRIEF AND ARGUMENT ON BEHALF OF APPELLANTS.

MR. A. J. PFLAUM,
MR. HENRY ACH,
MR. GEORGE PACKARD,
MR. JOSEPH M. ROTHSCHILD,
MR. S. O. LEVINSON,
COUNSEL FOR APPELLANTS.

BARNARD & MILLER PRINT, CHICAGO.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 391.

JOHN T. PIRIE, ROBERT SCOTT, GEORGE SCOTT, ANDREW McLEISCH, SAMUEL C. PIRIE, JOHN E. SCOTT AND JAMES GRASSIE, COPARTNERS TRADING AS CARSON, PIRIE, SCOTT & COMPANY, *Appellants*,

vs.

THE CHICAGO TITLE & TRUST COMPANY, TRUSTEE, *Appellee.*

Brief and Argument on behalf of Appellants.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE.

This case is brought here on appeal from an order and judgment of the Circuit Court of Appeals for the Seventh Circuit, affirming the judgment of the District Court of the United States in and for the Northern District of Illinois, holding that the claim of appellants, creditors of Frank Brothers, bankrupts, be disallowed, on the ground that appellants had been paid moneys by the bankrupts in the usual and ordinary course of business and without knowledge of or reasonable cause to believe the debtors insolvent or that they intended a preference, said pay-

ments having been made within four (4) months preceding the date of the filing of petition in bankruptcy.

The stipulated facts in the case, as shown by the record, page six, are: that for a long time prior to the filing of the petition against Frank Brothers, the bankrupts herein, Carson, Pirie, Scott & Company, appellants, had various dealings with said bankrupt firm, said dealings consisting of the sale by said Carson, Pirie, Scott & Company to said Frank Brothers, of goods, wares and merchandise on credit; an itemized account showing in detail the sales and the credits, consisting of payments in cash by Frank Brothers to Carson, Pirie, Scott & Company in the usual and ordinary course of business for a period of four months prior to the filing of the petition in bankruptcy, is shown on pages 8 and 9 of the record. Said account also shows in detail the dates of the respective items of debits and credits for said period of four months. It will be seen from an examination of said statement that beginning on September 12, 1898, and extending down to November 30, 1898, appellants had sold to the bankrupts, goods, wares and merchandise aggregating in all $4,131.81. The statement also shows the following items of credit:

Nov. 3 Cash paid	$858.20
Dec. 10 Cash paid	302.91
Dec. 19 Cash paid	175.68
Total cash payments	$1,336.79

and that from October 25 to December 6, the bankrupts had, at various times, returned merchandise aggregating $379.36, thus making a total credit of $1,716.15 received during the preceding four months, leaving the balance due to Carson, Pirie, Scott & Company $3,093.98.

The record further shows, page 6, that during all the times the foregoing transactions took place, said Frank Brothers were wholly and hopelessly insolvent, to the knowledge of said Frank Brothers, and that at the time of their adjudication in bankruptcy, their assets did not exceed the sum of $125,000, while their liabilities exceeded $500,000; that at the time said goods were sold by Carson, Pirie, Scott & Company to said bankrupts, and at the various times said payments were received on account by them from said Frank Brothers, neither said Carson, Pirie, Scott & Company nor any of their agents had knowledge of the insolvency of said Frank Brothers or had reasonable cause to believe that said Frank Brothers were insolvent or that when the said payments were made by said Frank Brothers to said Carson, Pirie, Scott & Company, that they or any of their agents or employes had reasonable cause to believe that it was intended thereby to give them preferences; said payments all being made in the usual, regular and ordinary course of business.

The record further shows that the claim of Carson, Pirie, Scott & Company having been proven and allowed and a dividend collected thereon, was afterwards, on petition of trustee reconsidered and disallowed, and said Carson, Pirie, Scott & Company ordered and directed to return and repay to the trustee the dividend heretofore paid to them by the trustee, amounting to the sum of $464.10. (Rec., 12 and 13.)

The ruling of the court below disallowing the claim of appellants was on the ground that the payments hereinabove set forth constituted preferences under the existing Bankrupt Act. (Rec., 33, 34 and 35.)

The sections of the Bankrupt Act upon which this decision is based are Sections 1, Sub. 25, 57 G and 60A.

Section 1. Meaning of Words and Phrases.—a. "The words and phrases used in this Act and in proceedings pursuant hereto shall, *unless the same be inconsistent with the context,* be construed as follows: * * * (25) 'transfer' shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security."

Section 57-g. "The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences."

Sec. 60. Preferred Creditors.—a. "A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

To these we add the following sections, which we respectfully insist must be taken into consideration in determining the questions herein involved:

Sec. 60 (b). "If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

"Sec. 60 c. If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estate, the amount of such new credit remaining unpaid at the

time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him."

"Sec. 3. Acts of Bankruptcy.—a. Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors, with intent to prefer such creditors over his other creditors."

"Sec 3 b. A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or if it is not from the date when the beneficiary takes notorious, exclusive or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment."

"Sec. 67 d. Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act."

"Sec. 68. Set-offs and Counter-claims.—a. In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set-off against the other and the balance only shall be allowed or paid."

"b. A set-off or counter-claim shall not be allowed in favor of any debtor of the bankrupt which

(1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use, and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy."

Specification of Errors.

First. The Circuit Court of Appeals erred in holding that the payments made by bankrupts to the appellants at the time and in the manner shown by the record, constitutes a preference, and that by reason of the failure and refusal of said appellants to surrender such payments, they were not entitled to prove their claim against the bankrupt's estate.

Second. The Circuit Court of Appeals erred in holding that in the bankruptcy proceeding the District Court had the power and authority to order, require and compel appellants to repay to the trustee the amount of the dividend received by appellants.

Third. The Circuit Court of Appeals erred in affirming the ruling of the District Court in holding that the claim of appellants should be disallowed.

Fourth. The Circuit Court of Appeals erred in affirming the judgment and decree of the District Court for the Northern District of Illinois.

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BRIEF.

I.

Bankrupt acts are remedial and must be liberally construed to effect their objects and purposes.

Crook v. *Peoples National Bank*, 60 N. Y., 309.
Tiffany v. *Lucas*, 15 Wallace, 421.
In re Miller & Brentano, Deady's Rep., 513.
In re Silverman, 1 Sawyer, 410.
Blake v. *Francis Valentine & Co.*, 89 Fed. Rep., 691.
Southern Loan & Trust Co. v. *Benbow*, 96 Fed., 514.
Loveland on Bankruptcy, p. 13.
Mayer v. *Helman*, 91 U. S., 501.
Loveland on Bankruptcy, Sec. 71.
In re California Pacific R. R. Co., 3 Sawyer, 252.

II.

If there is an ambiguity in a statute, the court, in construing the law, must arrive at the intention of the legislature, and in so doing can look beyond the mere words, and will never impute an intention which will lead to injustice, oppression, absurd consequences or great public or private mischief.

City of Baltimore v. *State*, 15 Md., 376.
In re Griffin Fed. cases, No. 5815.
Taylor v. *Taylor*, 10 Minn., 107.
Provident Life Ins. Co. v. *Mercer Co.*, 170 U. S., 593.

Union Ins. Co. v. *U. S.*, 6 Wallace, 759.
U. S. v. *Kirby*, 7 Wallace, 482.
McKee v. *U. S.*, 164 U. S., 287.
Endlich on Interpretation of Statutes, Sec. 295.
Matthieson v. *Hunt*, 14 C. B., 385.
Sutherland on Statutory Construction, Sec. 324.
Knowlton v. *Yates*, 31 Calif., 83.
People v. *Turner*, 39 Calif., 37.
San Diego v. *Grannis*, 77 Calif., 511.
Potter's Dwarris on Statutes, 130.
U. S. v. *Snow*, 4 Utah, 322.
Wike v. *Campbell*, 5 Colo., 131.
Hollingsworth v. *Palmer*, 4 Exch., 281.
Thompson's Ency. of Law, Vol. 23, p. 305.
Lake Shore R. R. Co. v. *Roach*, 80 N. Y., 341.
People v. *Utica Ins. Co.*, 15 Johnson, N. Y., 358.
Jackson v. *Collins*, 3 Cowen, 89.
Delafield v. *Brady*, 108 N. Y., 524.
Fowler v. *Paget*, 7 Term., 509.
Lau Ow Ben v. *U. S.*, 144 U. S., 47.
Smith v. *Townsend*, 148 U. S., 490.
Bloomer v. *McQueen*, 55 U. S., 14 Howard, 539.
U. S. v. *Babbit*, 66 U. S., 1 Black, 55.
Union Paper Co. v. *Nixon*, 105 U. S., 766.
Guaranty Ins. Co. v. *Sellers*, 123 U. S., 276.
Blake v. *National City Bank*, 90 U. S., 23, Wallace, 307.
Bate Refrigerating Co. v. *Sulsberger*, 157 U. S., 1.

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III.

Frequently, in construing statutes, for considerations of expediency, or to prevent extreme hardship, great injustice, public or private mischief, or to avoid an absurdity or unquestioned evil consequences, courts will construe a statute against its literal meaning, and against its terms, and will change, add or omit a word, supply a sentence or change the structure thereof.

Endlich on Interpretation of Statutes, Sec. 295.
2nd Ed. Am. & Eng. Ency. of Law, Vol. 6, p. 924.
Lundrum v. *Flanigan*, 60 Kans., 436.
Wisconsin School v. *Clarke Co.*, 79 N. W., 422.
Hawkins v. *Filkins*, 24 Ark., 286.
U. S. v. *Kirby*, 7 Wallace, 482.
McKee v. *U. S.*, 164 U. S., 287.
U. S. v. *Morrisey*, 32 Fed. Rep., 148.
Wriggs v. *Palmer*, 26 N. Y. State Rep., 198.
Carpey v. *Dowdell*, 24 Calif. Decisions, 63.
Sutherland on Statutory Construction, Sec. 323.
Ex parte Walton, Law Rep., 17 Ch. Div., 746.
Sutherland on Statutory Construction, Sec. 246.
People v. *Davenport*, 91 N. Y., 574.
U. S. v. *Fisher*, 2 Cranch, 43.
Lake Shore R. R. Co. v. *Roach*, 80 N. Y., 341.
People v. *Utica Ins. Co.*, 15 Johnson, 359.
Jackson v. *Collins*, 3 Cowen, N. Y., 89.
Delafield v. *Brady*, 108 N. Y., 524.
Fowler v. *Paget*, 7 Term. Rep., 509.
Heydenfeld v. *Daney Mining Co.*, 93 U. S., 634.
U. S. v. *Goldenberg*, 168 U. S., 95.
Knowlton v. *Moore*, 178 U. S., 41.

IV.

The present bankrupt law, for the purpose of carrying out the supposed intention of Congress, has been construed against its literal terms in the following cases:

In re Scanlon, Vol. 2, N. B. & N., 58.
In re Grubbs, Wiley Co., 96 Fed., 182.
In re Carolina Cooperage Co., Vol. 2, N. B. & N., 23.
In re Richards, Vol. 2, N. B. & N., 38.

V.

A payment made in the ordinary course of business on account, to a creditor who has no knowledge of the insolvency of his debtor at the time of receiving the payment, and no reasonable cause to believe such debtor insolvent, is not a preference within the meaning of the bankrupt act.

U. S. Statute at Large, 1898, Vol. 30, p. 544.
Loveland on Bankruptcy, Sec. 135.
Blakeley v. *Booneville Bank*, 95 Fed. Rep., 267.
In re Piper, Vol. 2, N. B. & N., 9.
In re Smoke, 2 N. B. & N., 831.
In re Smoke, 2 N. B. & N., 996.
In re Hall, 2 N. B. & N., 1126.

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ARGUMENT.

I.

THE STATUTE AND ITS CONSTRUCTION.

The important question to be determined is whether under the law a preference is created by the payment of moneys on account to a creditor in the usual and ordinary course of business, the creditor having neither knowledge of his debtor's insolvency, nor any reasonable cause to believe either that the debtor was insolvent or intended by such payment to give a preference.

The court below in construing Section 57 G, Sec. 60 A and Sec. 1, Sub. 25 of the Act decided this question in the affirmative, hence this appeal.

When, in the year 1898, Congress passed the existing bankrupt law, the Supreme Court of the United States, in construing the bankrupt law of 1867, had delivered itself of the following language:

> "It would be absurd to suppose that Congress intended to set the seal of condemnation on every transaction of a bankrupt which occurred within six months of bankruptcy without regard to its character. A policy leading to such a result would be an excellent contrivance for paralyzing business and *cannot be imputed to Congress without an express declaration to that effect.* . . . If it were so, no one would know with whom he could safely deal, and besides, persons in this condition (*i. e.* insolvent) would have no encouragement to make proper efforts to extricate himself from his condition."
>
> *Tiffany* v. *Lucas*, 15 Wallace, 421.

In order to properly construe a statute it is necessary to determine the objects and purposes thereof. When the Congress of 1898 acted in the premises they had before them the following language concerning the kindred law of 1867:

> "The bankrupt act is remedial and seeks to protect the honest creditor from being overreached and defrauded by the unscrupulous. It is intended to relieve the honest but unfortunate debtor from the burden of liabilities which he cannot discharge, and allow him to commence the business of life anew. Such a statute is not to be construed strictly as if it were a special enactment and this the sixteenth instead of the nineteenth century. The act establishes a system and regulates in all of their details the relative rights and duties of debtor and creditor. Such an act must be construed, as indeed all acts should be, *according to the fair import of its terms, with a view to effect its objects and promote justice.*"
>
> *In re* Miller & Brentano, Deady's Reports, 513.

The language just quoted was approved by Judge Hoffman as follows:

> "Strict rules of construction which are applied on a special case where a special statute gives to a court power to do a particular thing and which prescribes the precise method in which the power shall be executed, have no application to a case like the present, where full and complete jurisdiction over an extensive subject is given to a court constituted for the purpose."
>
> *In re* Silverman, 1 Sawyer, 410.

From the foregoing quotations it will appear that when Congress proceeded to the enactment of the law it must have known the interpretation of the Supreme Court of the United States and the Federal Courts as to the effect and purposes

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and objects of the bankrupt act. Having these declarations before it, and passing the statute of which we are now seeking an interpretation, it will be presumed that Congress intended that the present act should be a remedial one, that it should be construed in the light of present existing circumstances; that it would be construed *according to the fair import of its terms, with a view to effect its objects and promote justice,* and that one of its objects was to promote and increase business and not to paralyze it, to administer general equities and not to set the seal of condemnation upon every transaction of an individual occurring within four months of his bankruptcy.

That the judiciary of the United States have placed the present law upon the same basis as the quotations just indulged in, indicate that the courts viewed the former law, is borne out by the following citation.

Mr. Justice HAWLEY, of the 9th Circuit, in construing the present act, says:

> "The National bankrupt act is remedial and is to be interpreted reasonably and according to the fair import of its terms, with a view to effect its objects and to promote justice."
>
> *Blake et al.* v. *Francis Valentine & Co.,* 89 Fed. Rep., 691.

District Judge Ewart of North Carolina, referring to the present act, declared:

> "The authorities are uniform that the bankrupt act is a remedial one and to be interpreted reasonably and according to the fair import of its terms, with a view to effect its objects and promote justice."
>
> *Southern Loan & Trust Co.* v. *Benbow,* 96 Fed., 514.

Mr. Loveland, in his excellent treatise on bankruptcy, declares as follows:

> "That the purposes and objects of the act are:
>
> 1. To ascertain whether the person whose affairs are drawn in question has become a bankrupt.
>
> 2. If so, to take into legal custody all his property and assets of every description, for the purpose of making a fair and just division among all his creditors.
>
> 3. To protect the creditors from *fraud* and *unjust preferences.*
>
> 4. To ascertain the amount due to the several creditors and their priority, and
>
> 5. To relieve the bankrupt from his load of debts."
>
> Loveland on Bankruptcy, page 13.

The objects and purposes of the act being established by judicial determinations and the conclusions of learned writers, it now becomes essential to determine the meaning of certain language and certain sections heretofore quoted, contained in the act of 1898, upon the subject of what is and what is not a preference. By Section 1 of the present act, Congress undertook to define the meaning of certain words and phrases contained in the act, and amongst them the word "transfer" is defined as follows:

> "(25) Transfer shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a pledge, payment, mortgage, gift or security."

At the very inauguration of this section there is a limitation placed upon the definitions which Congress seeks to make and give, showing that Congress intended thereby that the definitions by them uttered should not be in every

instance strictly adhered to, but that they should be regarded as elastic and subject to construction by the courts, undoubtedly in furtherance of the purposes of the act, namely, to promote justice, foster business and be remedial. For they say that the words and phrases used in the act should be construed as defined in the section *"unless the same be inconsistent with the context."* Sec. 1, Act 1898.

It will be noted that although this bankrupt act and almost every other previous act in the history of England and America deals with preferences as an important subject under such acts, there is no definition of that term contained within Section 1 of the present statute. For the ordinary meaning, then, of the word "preference" we are necessarily referred to lexicographers.

> PREFERENCES: "The act of preferring one thing above another. The state of being preferred. That which is preferred. The person or thing more highly esteemed." Webster's Dictionary, Zell's Encyclopedia.

The only other provision in the act under consideration which sheds any light upon the question is section 60, which is entitled "Preferred Creditors," and not "Preferences." Subdivision a of that section declares as follows:

> "A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

It is upon this subdivision of section 60 construed with subdivision 25 of section 1, that it is contended by our adversaries and was held by the court below, that a payment in the ordinary course of business by a debtor to his creditor without knowledge of insolvency of the debtor on the part of the creditor, and without any intent on the part of the debtor to prefer, and without reasonable cause on the part of the creditor to believe, either that the debtor was insolvent or that he intended to prefer, constituted a preference under this act. In the construction of section 60, without the statutory definition of the word "transfer" as contained in section 1, it would be impossible to class such a payment as a preference. It is therefore for this Court to say, considering the entire act, its objects and purposes, whether Congress intended that, in construing Section 60a, the statutory definition of the word "transfer" should be applied and that such a payment should therefore come within the scope of the act, or whether, on the other hand, the ordinary meaning of "transfer" excluding such a payment, should govern.

The court will note there is a limitation contained in the word "transfer" in the very section now under consideration, for it is not all transfers made by a debtor of his property while insolvent that shall be construed against the debtor as a preference, and it is not all judgments which have been suffered or procured by an insolvent that shall be called a preference. Those only shall be deemed to be preferences as against the debtor which would enable any one of his creditors to obtain a greater percentage of his debt than any other of the creditors of the same class. To show the difficulties which would be presented in construing this section, should the contention of our adversaries be sustained, let

us illustrate: Suppose that A, being possessed of a capital of $50,000, should, on the first day of January, 1901, start in business and buy from B, C, D and E each $25,000 worth of goods; that he meet with losses or a judgment be rendered against him, which was not expected, for a large sum, and as a result he becomes insolvent, having no other liabilities. Thereafter he paid to B, C, D and E each the sum of $10,000, and within one month after the payments he went into bankruptcy. Did thosepayments constitute a preference under the act? Did one or the other in the language of the act, "obtain a greater percentage of his debt than other creditors of the same class"? If not, what other element would be necessary in order to create the preference? Would a creditor from whom the supposed individual purchased goods upon a credit subsequent to the time he made his original purchases be in the same class? Carry the illustration further: Suppose he had a secured creditor and made a payment to him within the time limit, does that creditor belong to the same class as those who were not secured? Take another view of it: Suppose he paid to all creditors who were not secured and had creditors whose securities were not ample to pay their debts, do the secured creditors belong to the same class as the unsecured under this law, so that the payment to the unsecured would warrant the courts in finding that such payments by the insolvent constitute a preference under the act? Nowhere in the act is there a classification of creditors. There are no creditors known or designated in the act as creditors of the first, second or third class. There are no creditors distinguished in the act as creditors whose claims are based upon transactions for the sale of goods as different

from creditors whose claims are based upon other transactions or any other classification designated by Congress. We present this view of the section to the court, and to a limited extent its attendant circumstances to establish the fact, that above everything else there is an ambiguity in that particular subdivision of the section. That ambiguity, perchance, may be disposed of if the court will hold, as is maintained by appellants it must, that the entire section 60 must be construed together and that subdivision (b) of that section must be construed with subdivision (a) and not as a separate enactment or a separate declaration by Congress. Unless this is done, other dire results will follow, as will be more fully set forth hereafter.

It is the conclusion of the appellants that in view of the qualification as to statutory definitions contained in section 1, the statutory definition of the word "transfer" must be held to be, so far as need be, inconsistent with the context of the law, and that in section 60 (a) it must be limited in its meaning to such transfers as the word ordinarily implies and not to payments.

Indeed, we need not step out of the narrow confines of the law itself to determine the fact that Congress intended in the context of the act to distinguish the word "payment" from "transfer." Were it otherwise, in referring to the disposition of property in any manner whatever, after the definition of the word contained in section 1, it would have been useless for the law-maker to use any other term than the word "transfer." And yet, in section 3, we find the following:

> "Acts of bankruptcy by a person shall consist of his having (1) *conveyed, transferred, concealed or*

> *removed* * * * any part of his property; (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditor over his other creditors. * * * (4) Make a general assignment for the benefit of his creditors."

It is also to be noted in subdivision (d) of Section 60 that Congress in passing this law had in mind the distinction between the payment of money and the transferring of property; otherwise, they indulged in tautology. By that section it is provided as follows:

> "d. If a debtor shall directly or indirectly, in contemplation of the filing of a petition by or against him, *pay any money or transfer property to,*" etc.

In subdivision (e) of Section 67, Congress indulged again in language which indicated that they did not intend the word "transfer" should include every means of disposing of property, such, for instance, as payments, for they say "that all *conveyances, transfers, assignments or encumbrances* of his property, or any part thereof made or given by a person adjudged a bankrupt," etc.

And again, in the same section we quote: "And all *conveyances, transfers or encumbrances* of his property made by a debtor at any time within four months," etc.

If Section 60 (a) is to be construed so as to include a payment under the word "transfer," and thus to make certain payments preferences, then it must be so construed as to make all payments preferences, irrespective of any time limit. Otherwise, the court could arbitrarily meet one condition of affairs by drawing aid and assistance from other portions of the act, and in considering another situation absolutely refuse to do so. It will be noted that in Section 60 (a) a debtor is deemed to have given a preference, etc., "if he

has suffered or procured a judgment" * * * "or made a transfer of any of his property," and the effect will be as heretofore stated. At no place in this initial subdivision of this section can be found a *time limit*. For aught that appears, any payments or any transfer made by a debtor four months, six months, one year, or perhaps any time within the statute of limitations preceding the date of the filing of his petition, must necessarily be declared a preference, if the debtor was insolvent when he made the payment. In this connection it is well to call the attention of the court to the difference in the meaning of the word insolvency under the present act and under prior acts of Congress. Under the act of 1867 an individual was legally insolvent when he was unable to pay his debts in the ordinary course of business, as they became due, irrespective of the amount of his assets or the amount of his liabilities in comparison thereto. Under the present act, no matter how far behind an individual might be in making his payments, he is not insolvent provided he has more assets than liabilities. While it may be true, under the former judicial interpretation of the word, a creditor could easily ascertain whether his debtor was meeting his payments in the ordinary course of business as they fell due; yet no one will gainsay the proposition that it is a practical impossibility to look into the affairs of another and ascertain, first, the quantity of his assets; next, their value, and, third, the amount of liabilities which an individual may be called upon to pay; and even though one were possessed of all the data necessary, namely, the property or assets and the liabilities of an individual, it would be next to impossible in many instances to determine the question of solvency or insolvency, if for no other reason, because of the difference in opinion which always exists concerning the valua-

tion of given assets, and in many instances their constant and almost daily change. Yet, to give to Section 60 (a) the construction which is demanded, and to hold that payments made by an individual while insolvent are preferences within the meaning of the act, it would follow that whatever penalty under the law rests upon a debtor or must be sustained by a creditor, is not limited by the section *to any time whatever.*

Now, as to the debtor, there is no penalty except that contained in Section 3 of the act, namely, that if he transfers while insolvent, any portion of his property to one or more creditors, *with intent to prefer such creditor over the other, he may be adjudged a bankrupt,* and a reference to Section 3 (b) of the act will indicate, however, that a petition against a debtor who is insolvent must be filed within four months after the commission of the act. It is absolutely essential to draw upon Subdivision b of Section 3 in aid of subdivision (a) thereof. Therefore, in order to obtain a time limit on the question of preferences, it is essential to draw upon subdivision (b) of Section 60. Subdivision b of Section 60, referred to as hereinbefore quoted, provides that if the bankrupt shall have given a preference within four months before the filing of a petition, and the person receiving it or to be benefited thereby shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person.

It is strenuously and most earnestly maintained by the appellants that in construing subdivision a of Section 60 in connection with subdivision g of Section 57, that the court shall read as understood in subdivision 60

(a) after the word "transfer" and after the word "judgment" the words contained in Subdivision b, namely:

> "And the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference."

There is no violence done by so doing, because if one is insolvent, and the creditor knows that fact, or has reasonable cause to believe it, then it almost necessarily follows that he had reasonable cause to believe that it was intended thereby to give him a preference. When the penalty visited upon a creditor who receives a payment is taken into consideration, the strength of our position and our contentions are made more manifest. This penalty is found under the title, "Proof and Allowance of Claims, Section 57 g," as follows:

> "The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences."

This is the penalty which a creditor, receiving a preference, must stand, by the direction of the law. The nature of that statute and the construction to be given it is important.

The construction which the court below places upon these sections has the effect of preventing an innocent creditor from proving up his claim against a bankrupt, unless he surrenders all payments made to him by the debtor within four months prior to the filing of his petition. This is a penal requirement—it is against common right, it is contrary to all the law and custom heretofore existing in civilized countries. It is depriving a creditor of property of which he has already become possessed. It is practically taking away from him his property, and statutes of that kind and character have been particularly

denominated and designated by all writers and the courts as penal in their nature. Indeed, this very section has received such a construction. Mr. Referee Jones (Wis.) said:

> "This section is in the nature of a penal statute, and should be strictly construed."
>
> *In re* Eggert, 2 N. B. N., 185.

> "Statutes which prescribe the manner in which persons shall use their private property, or restrict and regulate the disposition thereof, are against common right, and must be construed strictly."
>
> Vol. 23, Eng. & Am. Ency. of Law, p. 385.

Again, the same work, on p. 375:

> "It is a well-settled rule of law that penal statutes are to be construed strictly."

And on p. 378:

> "The rule under consideration applies * * * also to all statutes which impose, as punishment, any * * * forfeitures of money or other property, or of vested rights."
>
> "Penal statutes. Those which inflict a penalty for the violation of some of their provisions."
>
> Bouvier, Law Dict.
>
> "A penal statute is one which imposes a forfeiture or penalty for transgressing its provisions, or for doing a thing prohibited."
>
> Potter's Dwarris on Statutes & Constitutions (p. 74).

Within the definition of statutes that are penal Sutherland includes those which "impose any special burden, or take away or impair any privilege or right." (Sec. 358.)

Let us now "try out the right intendment of the law." It is a question, first, of interpretation. It requires, being a penal section, the closest possible attention to the literal

language used. Said Justice STORY, in *U. S.* v. *Gooding*, 12 Wheat., 460:

> "This is a penal act, and is to be strictly construed; that is, *with no intendment or extension beyond the import of the words used.*"

As was remarked in *State* v. *Powers*, 36 Conn., 77:

> "There is all the difference between a liberal and a strict construction of a statute. A case may come within the one unless the language excludes it, while it is excluded by the other unless the language includes it."
>
> "Penal statutes must be strictly construed, and never extended by implication."
>
> Potter's Dwarris, p. 245, N. 35.
>
> *Andrews* v. *U. S.*, 2 Story, 203.
>
> *Strinson* v. *Pond*, 2 Curt., 502.
>
> *Ferris* v. *Attwill*, 1 Blatch., C. C. R., 151.
>
> "To determine that a case is within the intention of a statute, its language must authorize us to say so."
>
> Sutherland, Stat. Cons., Sec. 349.

Now, looking at sections 57 (g) and 60 (a), and "with no intendment or extension beyond the import of the words used," what have we? In 57 (g), we find that the claims of creditors who have *received* preferences shall not be allowed unless such creditors shall surrender their preferences. What a preference is, we must look for elsewhere. What a creditor who has received a preference is, we must seek outside. What constitutes *receiving* a preference is likewise not explained. And, finally, as to *when* the preference must have been received in order to invoke the penalty, the section under discussion says nothing.

Taking section 60 (a), in the same way, we learn in what way a person shall be deemed to have *given* a preference—but for answer to the question, *when, how and where a creditor* shall be deemed to have *received* a preference, we get no solution at all within the law except as we shall hereinafter suggest.

How, then, "with no extension or intendment beyond the import of the words used," are we to gather from these two paragraphs that Congress intended and so here said, that a merchant who receives a payment on account, in ignorance of the debtor's solvency, or intent to prefer him, within *four* months of the bankruptcy of the debtor, has brought himself within the pains and penalties of section 57 (g)? It is an absolute impossibility. There is no definition in these sections of what constitutes a creditor receiving a preference without recourse "to an intendment or extension beyond the import of the words used," or at least without recourse to other parts and portions of the act. Nor do we find *any* limitation of time *when* the preference must be received to invoke the penalty, without recourse to extraneous sources. We *do* find that, so far as the debtor is concerned, if he makes a part payment on account that would give any one creditor a greater percentage of his debt than any other creditor, and *while insolvent,* he shall be deemed to have given a preference.

Our position in this connection is simply this: The two sections, 57 (g) and 60 (a) constitute a penal statute. They must be interpreted as they stand, if the position of counsel for the trustee is correct. But the language is not sufficient for the purpose claimed. It is ambiguous. We have seen that we cannot, by the rules ap-

plicable to the interpretation of penal statutes, obtain the result contended for from the language of the two sections relied on. We must travel outside, and have recourse to the subject-matter—and if we travel outside for one purpose, why not for another?

Traveling outside, and in the natural order of progress, we find, in the very next paragraph, part and parcel of the same section 60, paragraph "b," which fits perfectly into paragraph "a," rounding out and defining the complete purpose of section 60, and supplying the very missing elements, and reasserting the one dominating principle which since the dawn of business transactions in the world has visited with any penal consequences the action of a creditor in receiving what is due him—guilty knowledge of a guilty intent. Without this section 60 (b), section 60 (a) is meaningless, except where the bankrupt's own conduct is under scrutiny. Section 60 (b) makes it all clear, supplies the missing "four months," and furnishes the one and heretofore invariable test, if a creditor's acts are to be in any way tainted.

Section 60a, as we regard it, was undoubtedly passed for the purpose of establishing the status of the bankrupt, for Section A merely charges the bankrupt with *having given* a preference "if, being insolvent, he has procured or suffered a judgment to be entered against him in favor of any person or made a transfer of any of his property, etc." Nowhere in Section 60a are the rights of creditors alluded to, or sought to be affected. Congress left this subject for Subdivision B, and the reason of the distinction thus made, it seems to us, is apparent. If reference is had to Section 3a2, *supra,* we can readily see why Con-

gress, in 60a, charges the bankrupt with *having given* a preference if he made a transfer of any of his property.

If the bankrupt gives a preference within the meaning of 60a, that is, if he transfers any of his property to his creditors, he is guilty of an act of bankruptcy under the provisions of Section 3a2, and thereby subjects himself to the risk of having an involuntary petition filed against him. It seems clear from the words employed in Section 60a that Congress intended thereby to affect only the rights of the bankrupt, and this is patent when read in connection with Section 3a2.

Section 60a says plainly and directly to the bankrupt if you do thus and thus, you *"shall be deemed to have given a preference,"* and having so acted you have subjected yourself to the possibility of having Section 3a2 invoked against you and you can be thrown into bankruptcy.

But when we turn to the section of the statute which is to affect the rights of the creditor by reason of the preference defined under Section 60a, we find, under Section 60b:

> "If a bankrupt shall have given a preference within four months before the filing of a petition * * * and the person receiving or to be benefited thereby, or his agent acting therein, *shall have had reasonable cause to believe that it was intended thereby to give a preference,"* etc.

It will be thus seen that in order to affect the rights of the creditor, he or his agent must have had reasonable cause to believe that it was intended thereby to give a preference.

This in no wise destroys the effect of Section 57 g. That section can be equally enforced if the law is con-

strued as we contend. Under that section "claims" of creditors who have received preference cannot be allowed until such preferences are surrendered. The language of the act is not that a creditor cannot prove a claim upon which he has had a preference, unless he surrenders the preference, but it includes every claim which that particular creditor has at the time he seeks to enforce his debt in bankruptcy. Mr. District Judge ROGERS (Ark.), in construing the section just alluded to, held that a creditor could not prove *any* claim against the bankrupt's estate, though it be a distinct and separate debt from the one preferred, unless he surrenders the preference he has obtained.

In re Rogers Milling Co., 102 Fed. Rep., 687.
Reed v. *Finney,* Vol. 2, N. B. N., 1007.
In re Veslow, 104 Fed., 229.

Now, it certainly seems to be extraordinary to hold that if A had two or more separate claims against B, and B makes him a voluntary payment on account of one of the debts or claims and A had no knowledge of the insolvency of B at the time of the payment, that A could be prevented from proving any claim which he might have against the debtor, but if the court will consider and give to 57 g its entire effect, the result necessarily follows that the preferences referred to in that section are those defined and mentioned in subdivision b of Section 60. In other words, it never can be said that the simple payment of money on account in the usual and ordinary course of business is such a preference as to exclude one from proving his claims.

We insist that the creditor or his agent must have the knowledge or the cause to believe mentioned

in Section 60 b. It is most respectfully urged that Congress, in the arrangement of this law, and in its subdivisions, seemed to take special care to charge the creditor with knowledge and intent before his rights should be affected.

Unless this construction be placed upon the law, subdivision b of section 60 can only be held to apply to creditors who have been paid in full or a sufficient sum of money on account, to more than cover any possible dividend which they might obtain in the administration of the estate of a bankrupt. For, to give to the law the construction placed upon it by the court below, inflicts upon the innocent creditor precisely the same punishment as that visited upon the most guilty. Certainly this is such an extraordinary punishment that the penalty of barring such creditor from proving up his claims should not be imposed unless Congress intended that such part payments should be returned, and distinctly and in so many words directly and unequivocally so declared.

Now, if it was the intention of Congress that all innocent payments made within the period of four months should be returned to and become a part of the estate of the bankrupt, would they not, in passing the law, have enacted a provision similar to that contained in subdivision b of section 60, providing that the trustee could recover any and all such payments in any given case? No such intention can be imputed to Congress unless, as before stated, it has been so declared in unequivocal language. It certainly cannot be possible that Congress intended the act in any case to effect the return of those moneys and then feared to enforce the return, and penalized the creditor *just a little* for not returning it, but withheld a complete remedy. To affirm the conclusion ar-

rived at by the court below would be to say that Congress so intended in the case of innocent payees who have received a portion of their claim, but did not so intend as to innocent creditors who were fortunate enough to be paid their complete demands. In a word, we are simply contending that the every-day act of an innocent creditor in receiving payment on account of his debt should not be construed as a preference under this act, unless the intention of Congress is expressed directly and in the most positive terms to that effect.

It is not a question of the number of decisions this way or that, but of reason and of justice. In construing this law and these sections, Mr. Loveland, in his work on Bankruptcy, page 195, said:

> "A payment of money made in the ordinary course of business is not regularly deemed a preference."

And the court's attention is invited to the same author's sensible remarks in discussing this subject, to wit:

> "If the statute prevents any person who has received a preference which secures him in respect to a part of his debt or debts, from proving the balance, it might work a hardship on a diligent creditor. He may have secured such a preference more than four months prior to bankruptcy on a part of his debts, or upon one debt, and thereafter be prevented from proving the balance due him unless he surrender the valid security. On the other hand, it cannot be contended that a person who holds a *voidable* preference is entitled to prove and have his claim allowed until he has surrendered his advantage which he has secured in fraud of the act. This would seem to be the true intent and limitation of this provision."
>
> Loveland on Bankruptcy, Sec. 135.

Congress can never be presumed to have intended to impose a penalty upon ordinary business transactions—and upon an innocent party to the same, and if there be *any* construction that can be given the language to avoid such a result it is the duty of courts to adopt it.

We have shown how section 57 (g) must be interpreted in the light of the rest of the act. There is no more reason for deducing the meaning of Congress as to what constitutes receiving a preference from section 60(a) than from section 60 (b) or all of section 60 or section 3 (a), or all of the act. Nowhere in the act, or in any prior act, is a disposition expressed or shown to punish an innocent creditor.

Nowhere is there express language used declaring the reception of a payment on account of a debt by an innocent creditor a preference—and it is only by force of artful coupling or detaching of specific sections of the act to the exclusion of the spirit and terms and purposes and objects thereof, that anything even approaching the result contended for by our adversaries can appear.

As a matter of statutory construction, then, assuming that we have made out a case for construction, it is impossible to look at section 60 without seeing all subdivisions thereof. And in so doing and comparing the law of 1867, we find that Congress, in 1898, as well as in 1867, made the knowledge on the part of the creditor of the debtor's intent, absolutely essential to the visitation of a penalty upon the creditor's act. The dilemma is this: We cannot get along with section 57 (g) for any purpose pertinent to this discussion without turning to section 60. Turning there we must not limit our construction thereof to one subdivision or one part thereof.

The sub-topic "Preferred Creditors" in that section is the only portion of the act devoted solely to the subject of preferences and preferred claims and rights of preferred creditors. It defines what appears to be a preference by the debtor, and its effect as a preference as regards the cred-

itor. It is to this section alone and to this section as a whole in connection with section 3 a and the other sections quoted in the beginning of this brief, that we must look for construction of the law on preference whenever the rights of creditors are involved.

That the contention of the appellee is not the true solution of the intention of Congress is further evidenced by section 68a of the act, for, irrespective of when the transactions take place or the character thereof, it is provided by that section that in all cases (there being no limitation) of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated, and one debt shall be set off against the other, and the balance only shall be allowed or paid. This certainly is in direct contradiction of the construction placed upon the law by the Court of Appeals in this case. In fact, if their determination is at all permitted under the law, this section furnishes a contradiction of the law within itself, and whenever such a condition of affairs is presented, the courts are at liberty to consider the actual intention of Congress. Indeed, the learned Circuit Judge, in closing his opinion, indulged in this statement: "It may be difficult to reconcile the various phrases used in the act," etc.

In re Ft. Wayne Electric Co., 99 Fed., 403.

That it was not the intention of Congress to make a payment in the ordinary course of business a preference, is borne out by the Congressional records and the debates of Congress upon the act. In discussing the matter in the House, Representative Connolly of Illinois, a member of the Judiciary Committee, made the following statement:

> "To pay a creditor in the ordinary course of business is not to make him a preferred creditor; but the

debtor must do this with a specific evil intent at the time. He must do it first when he is insolvent; second, it must be done by him in contemplation of bankruptcy. And it must be done, not only in contemplation of, but with the full purpose of evading the bankruptcy act itself by giving to the person preferred an undue advantage in the distribution of his estate under the law. Now, what objection is there or could there be to such a law as that? It is not a 'preference' in the ordinary course of business. We are constantly making preferences ourselves. Men in trade all of them, at times prefer one creditor over another. It is a common occurrence in business. Here are a number of accounts due by the merchant to the wholesale dealer. He cannot pay all of them at this time. He sends a draft to A or to B, and says that to-morrow or next week he will send others to the rest of the merchants to whom he is indebted. Is that a preference within the eyes of the law? No; by no means. *Under this law it is not and cannot be a preference.* * * * So the act is carefully guarded not to interfere with those who are doing business in the ordinary way, transacting their business legitimately with a view to its proper conduct and with no intent to defraud."

Congressional Record, 55th Congress, 2nd Session, p. 1895, Feb. 18, 1898.

Senator Lindsay, of Kentucky, a member of the Senate Judiciary Committee, in discussing the bill, said:

"Preferences are forbidden, and when given with a knowledge of the creditor, his property or its value, or the money paid, may be recovered by the trustees; *payments in the ordinary course of business by the debtor in good faith will not be construed as a preference.*"

As we maintain and demonstrate that it was not the intention of Congress to pass a law making a payment in the ordinary course of business to an innocent creditor a

penal act and a preference, and that they, in fact, do not so do, we have shown that the statute is, to say the least, ambiguous, and that we are therefore entitled to a construction by the court in accordance with the following authorities:

Collins v. *New Hampshire,* 171 U. S., 30.

"On statutory questions where the human reason may pause and the judgment be suspended on account of the uncertainty in the language employed, broad considerations of expediency are not to be overlooked."

City of Baltimore v. *State,* 15 Md., 376.

"A construction which must necessarily occasion great public and private mischief must never be preferred to a construction which will occasion neither or either in so great a degree, unless the terms absolutely require such preference."

In re Griffin, No. 5815 Federal cases.

"In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect, and such purpose is to be taken into consideration in passing on its validity."

Collins v. *New Hampshire,* 171 U. S., 30.
Henderson v. *Wickham,* 92 U. S., 259.

"In case the real intention as deduced from the instrument itself is not indicated by the literal sense of the terms employed, the former must prevail over the latter. And where the literal interpretation involves any palpable absurdity, contradiction, or as it has been held, any extreme hardship or great injustice, the courts have deviated a little from the literal meaning of the words, and interpreted the instrument according to the apparent intent of its authors."

2d Ed., Am. and Eng. Ency. of Law, Vol. 6, p. 924.

"When a particular construction leads to a hardship, inconvenience or absurdity, the respect due from courts to a co-ordinate branch of the government or to a constitutional convention, will not permit them readily to presume that such construction was intended, and they will, under such circumstances, a little deviate from the received sense of the words, not because they have a right to disregard the will of the framers of the instrument, but for the purpose of truly arriving at and carrying out their will."

Taylor v. *Taylor,* 10 Minn., 107.

"Courts will lean to that construction of a statute which will uphold a transaction as consummated, when the good faith of all the parties is unquestionable."

Providence Life Ins. Co. v. *Mercer Co.,* 170 U. S., 593.

"If necessary to give effect to the evident intent of a statute, its language may be completed by reading into it such inadvertently omitted words as may be requisite to express its obvious sense."

Landrum v. *Flanigan,* 60 Kans., 436.

"When a statute is open to judicial construction, the court should give effect to the idea in the legislative mind, though it violates the literal sense of the words thereof."

Wisconsin, etc., School v. *Clarke Co.,* 79 N. W., 422.

"The rule of construction applicable to constitutions, as well as to legislative acts, is that if it appear that the intention is different from the literal import of its terms, then the intention must prevail."

Hawkins v. *Filkins,* 24 Ark., 286.

In the case of the *Union Insurance Company* v. *United States,* Chief Justice CHASE, in delivering the opinion of

this court, without dissent, substituted one word for another in a congressional act. And in so doing said:

> "The language of the act is certainly not clear, but when we look beyond the mere words to the obvious intent, we cannot help seeeing that the word 'or' must be taken conjunctively."

And further said that the act must be construed with reference to the general purpose and object of the act.

6 Wallace, 759.

In the case of the *United States* v. *Kirby*, 7 Wallace, 482, Mr. Justice FIELD, in delivering the opinion of the court, said:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence."
>
> "It will always, therefore, be presumed that the legislature intended exceptions to its language such as would avoid results of this character. The reason of the law *in such cases* should prevail over its letter."

Mr. Justice PECKHAM, in the case of *McKee* v. *U. S.*, 164 U. S., 287, quoted with approval the language of Chief Justice TANEY in *Brewer* v. *Blougher*, 14 Peters, 178, which was as follows:

> "It is undoubtedly the duty of the court to ascertain the meaning of the legislature from the words used in the statute, and the subject-matter to which it relates, and to restrain its operation within narrower limits than its words import if the court are satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it."

Mr. Justice Brewer of this court, sitting upon the Circuit, deliberately omitted a word from a statute of the United States, and in so doing, declared:

"It is a familiar rule that, that which is within the letter of a statute, and not within its spirit, is not within the statute; and also, that, that which is within the spirit, though not within the letter, may sometimes be declared to be within the statute, even in criminal cases."

And in construing the literal effect of the act under consideration, further said:

"Obviously that was not the intent of Congress. Through carelessness in the drafting or compilation of this section, the word was interpolated improperly, and the only fair construction of that section is to treat it as though that word was not there. So read, it gives force and validity to this clause, which otherwise it would not have. So read, it gives meaning to the whole section and carries out the obvious intent of Congress."

U. S. v. *Morrissy,* 32 Fed. Rep., 148.

To the same effect is:

Riggs v. *Palmer,* 26 N. Y. St. Rep., 198.

In a very recent decision by the Supreme Court of the State of California, not yet reported in the regular reports, the court held:

"A statute may be construed *contrary* to its literal meaning when a literal construction would result in an absurdity or inconsistency."

Carpy v. *Dowdell,* 24 Cal. Dec., 63, decided July 19, 1900.

The following is an epitome of the subject by a celebrated author on the interpretations of statutes:

"Where the language of a statute in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship, or injustice, presumably not intended,

a construction may be put upon it which modifies the meaning of the words, *and even the structure of the sentence.* This is done sometimes by giving an unusual meaning to particular words; sometimes by altering their collocation, *or by rejecting them altogether; or by interpolating other words;* under the influence, no doubt, of an irresistible conviction that the legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections of careless language and really give the true intention."

Endlich on the Interpretation of Statutes, Sec. 295.

Chief Justice Jarvis, in *Mathison* v. *Hunt,* 14 C. B., 385, says:

"It is not necessary to give the words used by the legislature their plain and natural meaning when such construction would only result in injustice and absurdity."

Mr. Sutherland, in his exhaustive work on Statutory Construction, Sec. 323, declares:

"A statute may be construed *contrary* to its literal meaning when the literal construction would result in an absurdity or an inconsistency, and the words are susceptible to another construction which will carry out the manifest intention."

Ex parte Walton, L. R. 17 Ch. Div. 746.

"Where general language construed in a particular sense would lead to an absurdity it may be restrained."

Sutherland on Statutory Construction, Sec. 246.
People v. *Davenport,* 91 N. Y., 574.

"Statutes will be construed in the most beneficial way their language will permit to prevent absurdity, hardship or injustice; to favor public convenience and oppose all prejudice to public interest."

Sutherland on Statutory Constructon, Sec. 324, and cases cited.

"The strict letter of the law, when the letter would lead to palpable injustice, contradiction and absurdity, will be controlled by reason and intention."

"Statutes should be so construed as to avoid absurd results not within the evil to be remedied, *and evidently not within contemplation of the legislature.*"

No construction of words is admissible, which gives to them an absurd signification if any other construction is possible.

Knowles v. *Yates,* 31 Calif., 83.
People v. *Turner,* 39 Calif., 370-379.
San Diego v. *Grannis,* 77 Calif., 511.

Much has been written upon the construction of statutes, and many are the rules laid down therefor, but the following rules, declared by the eminent Vattel, will lend aid in construing the particular law under consideration:

"Rule 34. Though a thing appears favorable when viewed in one particular light, yet if the propriety of the terms in their fullest extent lead to absurdity and injustice, their signification ought to be limited according to the rule."

"Rule 35. If there flows neither absurdity nor injustice from the strict propriety of the terms, but where a manifest equity or a great common utility requires restriction, we ought to adhere to the most limited sense which the proper signification can admit, even in an affair that appears favorable in its own nature."

Potters Dwarris on Statutes, pages 130-131.
See also *U. S.* v. *Snow,* 4 Utah, 322.
Wike v. *Campbell,* 5 Colo., 131.

It is declared to be an elementary rule that a thing which is within the letter of the law is not within the law unless it is also within the meaning of the law, and the words, if sufficiently flexible, must be construed in a sense

which, if less grammatical, may be more in harmony with their meaning.

Hollingworth v. *Palmer*, 4 Exch., 281.

Thompson Enc. Law, titles of Statutes, Vol. 23, first Ed., page 305.

This court by and through Mr. Justice WASHINGTON, on the question here discussed says:

"If from a view of the whole, or from other laws *in pari materia* the evident intention is different from the literal import of the terms employed to express it in a particular part of the law, that intention should prevail, for that in fact is the will of the legislature. * * * So if the literal expressions of the law would lead to absurd, unjust, or inconvenient consequences, such a construction should be given as to avoid such consequences, if, from the whole purview of the law, and giving effect to the words used, it may be fairly done."

"These rules are not merely artificial. They are as clearly founded in plain sense as they are certainly warranted by the principles of the common law."

U. S. v. *Fisher*, 2 Cranch., 43.

The court of last resort in the State of New York has had occasion several times to consider the question, and by unanimous opinion the following language was indulged in:

"It is manifest that this language (referring to a statute) cannot be taken literally. It cannot be doubted that the lawmakers did not intend that this law should be applied to such cases, *and yet they are within the letter of the law.*

Lawmakers cannot always foresee all possible applications of the general language they use, and it frequently becomes the duty of the Courts in construing statutes to limit their operation, so that they shall not produce absurd, unjust or inconvenient results, not contemplated or intended. *A case may be within*

the letter of the law, and yet not within the intention of the lawmakers; and in such a case a limitation and exception must be implied."

Lake Shore R. R. Company v. *Roach*, 80 N. Y., 341.
People v. *Utica Insurance Co.*, 15 Johns., (N. Y.), 358.
Jackson v. *Collins*, 3 Cow. (N. Y.), 89.
Delafield v. *Brady*, 108 N. Y., 524.

By one of the justices of England, of whom it was said by a chief justice: "That he was one of the best Crown lawyers that ever sat in 'Westminster Hall,'" the following declaration was made referring to a construction of statutes:

> "The circumstances must be taken into consideration which show that one or the other construction is reasonable, and among such circumstances it is impossible to discard the consequences. * * * otherwise a law calculated for wise purposes might be made a handmaid to oppression."

In determining that case, a bankrupt law in England was under consideration, and it was provided by the law that it was an act of bankruptcy for a man to "leave his dwelling house to the intent, or whereby his creditors might be defeated and delayed," and that case, it seems to us, bears a strong analogy to the one under consideration. It was claimed that an act of bankruptcy was committed when a man left his dwelling house, because thereby his creditors were defeated or delayed in obtaining service, or in collecting their demands. In construing the statute, however, the word "or" was changed to mean a departure from the house with the intent to defeat and delay creditors; and in refusing to adopt the literal construction of the act, Lord Kenyon said:

"I will adopt any construction that the words will bear in order to avoid such monstrous consequences."

And further declared that it was impossible for any one to be guilty of a given act without the intent to perform it.

Fowler v. *Paget*, 7 Term. R., 509.

This court has declared as follows:

"In construing a statute the court is not to look into any single phrase in it, but to its whole scope, in order to arrive at the intention of the makers of it."

"If a literal interpretation of any part of it would operate unjustly or lead to *absurd results* and be contrary to the evident meaning of the act, taken as a whole, it should be rejected."

And Mr. Justice DAVIS, in speaking for the court, in that case, said:

"This interpretation (referring to the conclusion of the court), although certainly contrary to the letter of the statute, is within its spirit and reason."

Heydenfeld v. *Daney Mining Co.*, 93 U. S., 634; 3 Otto, 634.

The Hon. Chief Justice of this court, speaking for the court, and without dissenting opinion, expressed these views:

"Nothing is better settled than that a statute should receive a sensible construction, such as will effectuate the legislative intention and, if possible, so as to avoid an unjust or an absurd conclusion."

In the case from which this language is quoted, it was provided by the letter of the law that the provisions thereof should apply to all Chinamen, and yet the court stated:

"The general terms used should be limited to those persons to whom Congress manifestly intended to apply them, and that would be evidently those who are about to come to the United States for *the first time*."

Lau Ow Ben v. *U. S.*, 144 U. S., 47.

Speaking for this court Mr. Justice BREWER said:

> "It is well settled that where the language of a statute is in any manner ambiguous or the *meaning doubtful,* resort may be had to the surrounding circumstances, the history of the times, and the effect or mischief which the statute was intended to remedy."
>
> *Smith* v. *Townsend,* 148 U. S., 490.

And again the same learned justice, in a more recent case, said:

> "It is true there are cases in which the letter of the statute is not deemed controlling," and he indicates them to be "cases where the moral sense is offended, or an injustice, oppression or absurdity is involved,"

and in such cases directly infers a warrant for an interpretation against the letter of the law.

> *U. S.* v. *Goldenberg,* 168 U. S., 95.

In support of our position on these questions of construction, the following cases are also cited:

> *U. S.* v. *Babbitt,* 66 U. S.; 1 Black., 55.
>
> *Bloomer* v. *McQuewan,* 55 U. S.; 14 How., 539.
>
> *Union Paper Bag Co.* v. *Nixon,* 105 U. S., 766.
>
> *Guarantee Ins. Co.* v. *Sellers,* 123 U. S., 276.
>
> *Blake* v. *National City Bank,* 90 U. S.; 23 Wall., 307.
>
> *Bate Refrigerating Co.* v. *Sulzberger,* 157 U. S., 1-38.

We also respectfully urge upon the attention of the court a more recent determination of the subject. In construing the revenue law and that portion thereof requiring the payment of a tax on inheritances, the court, after illustrating the gross inequalities which would inevitably result from a literal construction of the act, said as follows:

"We are therefore bound to give heed to the rule that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute."

Knowlton v. *Moore,* 178 U. S., 41, at page 77.

By chapter 2 of the Act of Congress, approved July 1, 1898, which provides for a "Uniform System of Bankruptcy throughout the United States," the several District Courts of the United States are created Courts of Bankruptcy, and certain enumerated powers are given. In addition thereto is added the following:

"Nothing in this section contained shall be construed to deprive a Court of Bankruptcy of any power it would possess were certain specific powers not herein enumerated."

It follows as a necessary conclusion that Courts of Bankruptcy under the present act are precisely in the same category as courts of bankruptcy under the act of 1867, and in referring to that act, and the power of the courts thereunder Mr. Justice Hoffman (Cal.) said:

"The jurisdiction thus attributed to the District Courts is more varied and extensive than that conferred by all other acts of Congress combined. It was evidently the intention of Congress to establish a complete system of bankruptcy proceedings, and to confer upon courts of bankruptcy constituted by the act *plenary* jurisdiction over the whole subject and extending to all matters and things to be done under and by virtue of the bankruptcy act. *In the exercise of this jurisdiction these courts have authority to do every act necessary and proper to carry into effect the policy and purposes of the law.*"

In re Cal. Pac. R. Co., 3 Sawyer, 252.

In line with this decision Mr. Loveland, in his work on Bankruptcy, declares:

> "In construing this bankrupt act, which gives full and complete jurisdiction over the subject to courts constituted for that purpose, the strict rule of construction which is applied where a special statute gives to a court power to do a particular thing and prescribes the mode in which the power shall be exercised, has no application. The language of the act of 1898 is very broad and general, and it is to the effect that courts are made courts of bankruptcy and are invested with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, etc."
>
> Loveland on Bankruptcy, Sec. 71.

With the plenary power vested in courts of bankruptcy and these rules of construction before the court, remembering the objects and purposes of the bankrupt act and the language of Mr. Justice DAVIS in *Tiffany* v. *Lucas, supra,* but little difficulty should be encountered in construing the act to avoid the injustice, the inconvenience and the absurd results and great public mischief which would otherwise follow.

Mr. Justice RUSSELL of the Supreme Court of the State of New York, in the case of *Crook* v. *Peoples National Bank,* referring to the present bankrupt act, 60 N. Y. Sup., 309, decided in November, 1899, says:

> "The National Bankrupt Act does not intend to interfere with or destroy the orderly business of the country or to prevent courageous struggles of persons straightened for present means to survive financial crises and regain and maintain business credit any further than the exigencies of a law more calculated in respect to the questions here involved to be preventive than remedial, absolutely required. It is indispensable that credit transactions which embrace

> a large volume of the business of this country should be undisturbed by needless doubt or perplexity, and no extension of the lines of repressive legislation beyond those of a fair construction will be had to prevent the harmonious routine of daily affairs."

Assuming the existence of the ambiguity in the law, to which we have called attention, there is no room to doubt the power of the court to construe the law so as to avoid any inconvenient results.

If, by a literal interpretation of the law, it would follow that a payment made by a debtor without knowledge of his own insolvency and without intent to prefer, and in the ordinary course of business, to a creditor who likewise is unacquainted with the insolvent condition of his debtor and who has no reasonable cause to believe that condition to exist, would be a preference under the act, and as a result the innocent creditor would lose his right to share in the avails of a bankrupt's estate, we then maintain that we are strictly within that line of authority which permits a court to construe the law against its literal meaning.

II.

INEQUALITY, INCONVENIENCE, ABSURDITY AND EFFECT OF APPELLEE'S CONSTRUCTION.

The construction of the sections of the statute involved in this appeal has a direct and far-reaching effect on the commercial interests of the country, and it is well in considering these effects, to bear in mind what has already been said concerning the objects of the act as declared by judges and law writers.

In interpreting a law the court should take into consideration the business interests of the nation and the manner in which that business is done, and must carefully weigh the effect of its rulings upon commerce generally.

The object of the bankrupt law is to foster business, and not to paralyze it.

Query: Was it the object of the lawmaker to destroy the general credit business existant in the United States? Was it to punish the diligent and the innocent creditor and to compel him to pay a penalty for his diligence and his right to do business?

It certainly cannot be presumed that Congress intended to harass and embarrass the business of the country, or create a law which would occasion great public and private mischief, or one which would prejudice public interest or work hardship to private interests, or, if enforced, lead to an absurdity; nor is the intention to be imputed to Congress that it desired to compel honest debtors upon the slightest provocation and upon a mere suspicion of their insolvency to throw up their hands and say that they must not make any effort to keep to the surface; they must not struggle in the performance of their duties; they must lose all energy and all ambition and not attempt to extricate themselves from a financial strait. The act must be held to have been passed with the intention to administer general equities, to promote justice, to prevent bankruptcy, and to encourage business and trade.

See *In re* Miller & Brentano, *supra.*

It is respectfully submitted that unless the arguments advanced by appellants be sustained, and the judgment of the Circuit Court of Appeals in the Seventh Circuit be

reversed, all the dire results suggested would be the natural and inevitable consequences of the bankrupt law.

A construction such as is contended for by appellee would tend to revolutionize business, stop the credit system and create bankrupts.

To illustrate. There is no proposition of law better settled than that the relation between a banker and depositor is one of debtor and creditor. Under the act private bankers may be adjudged bankrupts. Let us apply the doctrine determined upon by the court below to the case of a banker. Every time an individual depositor presented his check and drew out funds on account of the amount which the banker owed him, he would be receiving a partial payment. Assume an individual, or any number of individuals, who within a given period of four months had withdrawn fifty per cent. of the funds they had deposited with such banker and suddenly it was discovered that the banker was insolvent when such payments were made. Does it not sound absurd, inconvenient, inequitable, unjust, to hold that these creditors could not prove their claims in bankruptcy against the banker because they had received a payment within four months on account of their claims? Yet if the construction of the law given by the court below be affirmed such will be the direct effect in the supposed case.

Another illustration which will positively demonstrate the absurdity and injustice of the conclusion we are seeking to reverse: Suppose A has attained the age of sixty years; has acquired a competency of $100,000; has invested it by loaning it to a friend whom he deemed to be absolutely responsible; this friend has had this money at a rate of five per cent. for a long period of years;

suddenly A is called upon by his debtor and informed that he no longer desires to keep his $100,000 and wishes to repay it; A, having no other place to invest the same, finally prevails upon his debtor to retain $50,000 of the loan. Thereupon the individual, A, figuring that the returns of $50,000, *i. e.*, $2,500 per annum would more than supply his wants, distributes the $50,000 which is paid to him among his immediate relatives as gifts, or endows a chair in some university. He has no knowledge of the insolvency of his debtor at the time he receives the payment. Thereafter, and within four months after receiving the payment, and after its distribution by him as before stated, his debtor is forced into bankruptcy and it is ascertained that he was insolvent at the time of making this payment. It is absolutely impossible in any given case to tell what an estate will realize or will pay, and yet the individual A, without any fault of his own, under the construction given the law by the court below and contended for by the appellees herein, himself becomes a bankrupt, because even though the estate were to pay 40 cents on the dollar it would be a sheer impossibility for him to procure $50,000 to pay back into the estate in order to recover $40,000. Is it not apparent from this illustration that to construe the law as did the Court of Appeals for the Seventh Circuit would be to impute to Congress the desire to legislate an absurdity?

Let us take still another illustration which will also demonstrate the effect of such construction. Under the bankrupt law, in some cases, it requires three or more creditors to file a petition against an insolvent debtor. These creditors must have provable claims. If they have

received a payment, until it is surrendered, they have no provable claim. Therefore, what is there to prevent any debtor who fears bankruptcy, who has within himself the knowledge of his own affairs and his assets and his liabilities, for a period of four months, to prevent his creditors from inaugurating any proceedings in bankruptcy as against him. This he could do by partial payments to all, or a sufficient number of his creditors. In other words, if the construction given to the law is sustained it is within the power of any insolvent debtor to prevent proceedings in bankruptcy being sustained against him.

Now let the absurdity, inconvenience and injustice be made still more apparent and let us exhibit to the court how a bankrupt could take advantage of the law and his innocent creditors, and thereby perpetrate a fraud.

Suppose A to be insolvent; that he owes $100,000; that he has assets to the extent of $75,000; that of the $100,000 he is indebted to John in the sum of $30,000, to Frank in the sum of $25,000, and to A, B, C, D and E for the balance. Let us assume he desires to protect John and Frank; desires to favor those creditors to the extent of their claim, if possible. How simple it is for him to do so by making partial payments to his other creditors and then go into bankruptcy. John and Frank, who have provable claims, elect a trustee and object to the claims of all other creditors, because, forsooth, they have received a preference under the bankrupt act. Let it be remembered, as each and every man of affairs throughout the length and breadth of this country will know, that never can it be ascertained in advance of a final closing up of a bankrupt's estate, what the estate will pay. That fact

being admitted, where is the individual, the firm or the corporation who would be foolhardy enough to repay into a bankrupt's estate an honest, important payment, which he had theretofore received in the ordinary course of business? How can he tell what the assets will realize? How can he tell what liabilities will spring up against his debtor? How can he predict what litigation the estate will be put to, or what amount of the estate will be deducted by reason of court costs, referee's, trustees' and attorney's fees, and expenses of administration? In short, how can any individual, in any given case, until perhaps it is too late to prove his claim, determine whether an estate may pay an amount equal to the amount which he would be compelled to return?

Another illustration to the same purpose. Courts will take judicial knowledge of the common affairs of life and the ordinary course of business, and it is well known as a fact that much of the business of the United States is done upon a credit system and upon either a sixty, thirty or ten-day term. At a given time, then, four months prior to the filing of a petition by or against a bankrupt, he may be owing a creditor say $10,000, in the four months preceding that time, upon various transactions and upon a running account, by payments the creditor may have received a million dollars from the same debtor. Is the court to hold, as it must if this construction be followed, that in order to obtain a dividend upon $10,000 a creditor in the given case must pay into the insolvent estate one million dollars?

Now, let us submit another illustration to show that it is even possible for the debtor to make money by going

into voluntary bankruptcy, if this construction is to be sustained.

A manufacturing firm made an arrangement by which they settle all purchases made during a certain month with a sixty-day note payable at a certain bank. For five years these notes were paid at maturity by the bank. By this method the firm established a good credit, but their indebtedness to the bank gradually increased until it reached $40,000. The bank squeezed the firm for $10,000 and then forced them into bankruptcy. The firm had paid all their creditors through the note system in four months more than twice the amount owed at the time of the assignment, and none of the creditors could prove their claims except the bank, which could well afford to replace the $10,000. The firm's statement showed nominal assets of $80,000: liabilities, $75,000. In administering the estate the assets dwindled down to less than $50,000, while the liabilities remained at $75,000. As none of the creditors were foolish enough to file a claim, it leaves the bank a clear field to make their $40,000 out of the $50,000 of assets. Query: What becomes of the balance? Does this not look like a preference through a law intended to prohibit a preference?

Here is a kindred illustration: Suppose a bankrupt has paid every one of his creditors a certain amount of money in partial payments within four months preceding bankruptcy; that his assets at the time of the filing of the petition amounted to $50,000 and his liabilities were $100,000. Every creditor having received a substantial payment within four months refused to surrender the money which was collected in the usual, regular and ordinary course of business. If the construction of the court below is sound, there are *no* creditors who have provable claims against the bankrupt. Is it not the height of ab-

surdity to say that such a condition of affairs as here depicted could exist under the bankrupt act; that the bankrupt estate should have $50,000 worth of assets and liabilities of $100,000 and no creditors permitted to prove claims or molest the bankrupt? Query: Who gets the property? Did Congress intend any such absurdity? Will the courts so construe it?

Carry the last illustration a step farther and suppose that two-thirds in amount of the bankrupt's creditors had received substantial payments and that they could not therefore afford to return them; would not the bankrupt act positively and directly, as construed by the court below, result in giving a preference to the creditors to whom the bankrupt had not made any payment, because, under these circumstances they would have provable claims and an administration of the estate might pay them in full, whereas, the other creditors, who had committed no offense against the law, had conducted their business in the ordinary way, had received payment, by mail, perhaps, are placed in the position where they can obtain no dividend and no return from the bankrupt's estate. Is this equality? Is this equity? Is this justice?

The following illustration has been found in one of the opinions written by Referee WISE of New York:

> "A debtor purchases $10,000 worth of goods from each of the firms, A. & Co., B. & Co. and C. & Co., within four months of his bankruptcy. His purchase from A. & Co. is on ten days' credit. He pays this debt and A has been paid in full. Of B. & Co. he has bought two bills of $5,000 each, one on thirty days' credit, the other on four months. The debtor pays the first bill at its maturity, and B. & Co. thereby receive a payment of $5,000 on account of their debt. Upon the bankruptcy of their debtor they cannot share with C. & Co. unless they first pay back the

> $5,000 innocently received by them. Then they are not in the same class of equality with A. & Co., who can lawfully retain the $10,000 received by them within four months of the bankruptcy. If A. & Co. be held liable to pay back the $10,000 received by them then perfect equality among the creditors of the same class would be obtained when B. & Co. repaid the $5,000 received by them. But why the preference to the extent of $5,000 should be condemned in the case of B. & Co. and upheld and sanctioned to the extent of $10,000 in the case of A. & Co. does not appear, and of course cannot logically or equitably be made to appear."

Let it be remembered it is not contended by the appellees or by any one in construing the bankrupt law, that where a creditor has been paid in full within four months prior to the inauguration of proceedings in bankruptcy and the creditor has no knowledge of the insolvency of the debtor that the payment can be recovered by the trustee. A creditor who is fortunate enough, or has been sufficiently diligent to collect all of his claims, is placed in a better position than the creditor who has been indulgent with the debtor and has sought to uphold him and has not demanded the full payment of his account. This same position holds good whether the account of the creditor has matured or not. Under the construction given to the law by the court below, the debtor is in a position to discount and pay in full the bills of any given creditor, and he, the creditor is absolutely without the portals of a bankrupt court, whereas the individual or firm to whom he may be owing a larger sum of money and an older debt is deprived practically of his entire debt because the debtor has remitted him a portion thereof. Is this not absurd? Is it not inconvenient? Is it not unjust, and is it not inequitable? And is it not equally im-

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possible for this court to determine that Congress intended the condition of affairs which is here presented? Does not such an interpretation and the effect thereof shock the mind of the Chancellor? Does it not have an immediate and direct tendency to check credits? Does it not interfere with common law, with custom, and with the business of the country?

To maintain this construction you must say to your debtor when he presents you with money on account and asks you to wait for the balance because of illness in his family, accident or bad business, "No, sir; you must take back this money, keep it yourself until you can save enough to pay us in full and then give it to us, for we cannot accept your money on account." "You must get out and raise every dollar of it or we will close you up. Our reason is, if we take part of your money now, and within four months thereafter it should be discovered that you are now insolvent, we would be compelled to pay this money back before we could prove our claim, and as we cannot tell what will happen in four months we must refuse your money."

Yet if the decision of the court below in this case is to be upheld such will necessarily be the effect.

Smith, a merchant carrying on business, is indebted to his banker in the sum of $20,000. Having moneys on hand which he does not require for the moment, he pays the bank $10,000 on account, perhaps anticipating the maturity of his debt. The bank has no knowledge of his insolvency, has no reasonable cause to believe that the debtor is insolvent, and in the ordinary course of business accepts the payment. Within four months thereafter the debtor voluntarily takes advantage of the bankrupt act, and it is found he was insolvent at the time he made the

payment to the bank. A creditor, or the trustee objects to the claim of the bank which is presented for the balance, because of the payment of the first sum, and demands that before the bank can share in the debtor's estate it must first surrender the payment made in the regular and ordinary course of its business. Can it be possible that Congress ever intended that in such a case the creditor forfeits his right to file his claim unless he shall surrender to the estate the payment which he thus obtained, even though his estate may be more valuable at the time of the bankruptcy than it was at the time when the payment was made?

To proceed: Suppose the same facts to exist and that an individual who became a creditor one month before the bankruptcy proceedings and two months after the bank had received the payment, objected to the bank sharing in the dividends from the bankrupt's estate because of this alleged preference. If the law is to be construed as contended for by appellee one who became a creditor subsequent to the time of the payment which is denominated a preference, could make the objection, and thus have recourse to an estate of greater value than that which he credited. And yet, at the same time, under this construction, if the bank had been paid in full, as before stated, the transaction is ended.

Take some merchant or some bank and assume that within two weeks before an adjudication in bankruptcy the debtor had paid the bank in full, and assume further that the same debtor had made a payment on account within a month previous to his bankruptcy to some other creditor who likewise did not know of the insolvency of the common debtor, and who likewise had no reasonable

cause to believe the debtor to be otherwise than solvent, yet under the law as contended for by the appellee the bank could retain all its money and the creditor who was paid previous to the bank, but only on account, could not prove up his claim unless he surrendered the amount paid to him by the debtor.

We maintain that in the very letter of the law there stands forth the contradiction of the position of the appellee herein. We contend there can be no recovery, directly or indirectly from any creditor unless he knew the debtor was insolvent at the time of the payment or had reasonable cause to believe it and that to construe the act as contended for by the appellee, would be practically to declare that a recovery could be had without that essential condition which warrants a recovery in the letter of the law.

Yet in this case, if Carson, Pirie, Scott & Co. have a claim against Frank Brothers for $4,000 on a given day and Frank Brothers pay to Carson, Pirie, Scott & Co. on various dates on account of said claim the sum of $1,000, does not the money which was paid become the absolute property of the appellants, and have they not in addition thereto a claim against Frank Brothers for $3,000? And if you say to them: "You cannot recover your balance or any part thereof, unless you first pay to all of the creditors of Frank Brothers the sum of $1,000," is it not a recovery by a trustee from that creditor, irrespective of the fact as to whether or not the payment was intended as a preference and irrespective of the fact as to whether or not the creditor had reasonable cause to believe that it was intended as a preference. In other words, would not such a construction be in violation not only of the spirit, but of the letter of the law?

We advance another step in illustrating this matter. Suppose upon January 1st Smith was indebted to Brown in the sum of $1,000; that he paid him $500 on account; that upon that date Smith thought his assets were largely in excess of his liabilities; he had no idea he was insolvent; he did not intend to fail, and was continuing his business in the usual and ordinary manner. Assume that on the 15th day of April, within four months thereafter, by reason of losses which he had sustained and of which he had not heard prior to the time of the payment, he was insolvent when he made the payment, filed his petition in bankruptcy and scheduled Brown as a creditor to the extent of $500. Assume that his assets realized $2,500 and his liabilities were $10.000. A distribution of these assets would pay 25 per centum and would pay to Brown $250 upon his claim.

Now, if the contention of the appellee in this case is sustained, Brown would be compelled to pay into the estate of Smith, the sum of $500 to obtain a dividend on his entire claim, which dividend would amount to $250, or 50 per cent. less than the amount he surrendered. And if the court will reason it out and assume that there is no case which will arise in bankruptcy where the estate will pay dollar for dollar it will be practically impossible to present a statement of facts where any creditor who has received a payment to the extent of 50 per cent. of his claim can afford to surrender what the appellee calls a preference. Such an absurdity was never intended by Congress, and yet it is the necessary result of the construction of the law indulged in by the court below.

Again, suppose the appellants, merchants of Chicago, were the owners of a note against John Doe for the sum of $1,000, payable three months after date. Thirty days

before the maturity of the note the debtor called upon them, desiring, to a certain extent, to stop the running of interest, paid them fifty per cent. of his note, leaving a balance of $500. The note, not being due, and the appellants requiring funds, they sold the note before maturity in the open market for the sum of $500 to Richard Roe who became the purchaser of the note in good faith. The note was endorsed by the appellants without recourse. It was not paid at maturity or within a month thereafter, and perhaps two months after the appellants had received the partial payment John Doe goes into bankruptcy. Query: Can Richard Roe prove up his claim against the bankrupt's estate for the sum of $500, the amount due upon the promissory note, or must he, before he can so do surrender to the estate the sum of $500 which he never received? To say yes in answer to the latter part of the question would undoubtedly be stamped as absurd and ridiculous; yet if the construction of the court below is maintained and it should be held that Richard Roe in the given case would not be estopped or debarred from proving up his claim, why should Carson, Pirie, Scott & Co., in the illustration be deprived of their legal rights and of their right to collect their individual property? The same illustration will apply to a bank and to a merchant, and if an assignee, without notice, could prove up the claim it would be incumbent upon every merchant who received a partial payment of his account current with the debtor to immediately obtain notes for the balance and sell them to some friend or in the open market.

If the language of the law is to be enforced, as appellee declares it is written, and all the claims of creditors who have received preferences shall be rejected unless they surrender the preference, so-called, could it not be cir-

cumvented by creditors immediately upon receiving a payment in the ordinary course of business, transferring or assigning their accounts?

Under Section 68 of the act it is provided that "in all cases of mutual debts or mutual credits between the estate of the bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other and the balance only shall be allowed or paid." In construing this section some of the courts have held that it did not refer to a creditor who had received payments on account; that it referred to original claims that a debtor might have in the given case against his creditor; that it referred to cases where both parties, the bankrupt and the creditor, occupied each to the other the relation of creditor and debtor, and *vice versa*.

If that is so, how easy it is to defeat the law as construed by the court below. What a simple thing it would be for a merchant or a banker, when a debtor desired to make a payment, to say to him, "No, we will accept no payments on account; if you have any money, you are owing us some, and we will borrow what you have and give you our note for it, and we will still maintain our original claim against you." And in this way, if the law is as determined in the court below, the entire subject can be disposed of by instructing bankers and merchants to do business in the way last indicated.

Illustration after illustration could be presented to show the absolute absurdity of the construction contended for by the appellee. It is almost unexceptional that persons in every walk of life have current accounts with those who supply them with household necessaries and the daily requirements of life. The butcher, dry goods merchant and the grocer as a rule have accounts current

as against almost all, and when one's wife makes a payment on any of these, or on account of tuition for one's children, or on account of house rent, whether by the year or by the month, the same condition of affairs would exist, and the man who daily supplies the necessaries of life could in the given case recover no *pro rata* from his debtor's estate if he had received any payment on account within four months prior to the filing of a petition in bankruptcy. Indeed many instances could be presented which would convince this court that it is a practical and absolute impossibility for a creditor to procure the funds necessary to make this repayment.

In many cases it might force a creditor to borrow money, to sell or mortgage his home, and perhaps bankrupt him. These illustrations are not fanciful. They are facts, and based upon actual transactions in life.

Mr. Referee Bullard reports having the following case at present in hand:

> "I have one case before me—a department store—at the present time there are about one hundred thousand dollars assets and about a thousand creditors. I do not suppose there are over two hundred that have not received payments within four months. Now, the result of the Columbus Electric Company doctrine would be that most of the creditors would refuse to turn back what they received and the bankrupt might get half of the hundred thousand back."

Mr. Referee Scott reports having this case in hand:

> "I have a case—The Glens Falls Umbrella Company. Since the decision in the Columbus Electric Company case the creditors have all withdrawn their proofs of claim, and unless they re-prove, there will be $10,000 that will be paid back to the company."

See National Bankruptcy News and Reports, Vol. 2, October 1, 1900, page 14.

The "Columbus Electric Company case" is the original case decided by the Court of Appeals of the Seventh Circuit upon the question here involved, and is the basis for the decision of the court below in this case.

In re Ft. Wayne Electric Corp.
Columbus Electric Co. v. *Worden,* 99 Fed. Rep., 400.

We ask, is it equitable to prevent one creditor from proving his claim, allow another to receive his money in full, and the debtor entitled to his discharge and in addition thereto, the assets out of his estate and all the while multitudinous creditors unable to take action under the law? We have no hesitation in here declaring that had the justices in the court below been fully instructed, the decision in the "Columbus Electric Company case" would have been different.

To enforce the law as construed by the court below it must now be apparent to this court, will maim if not entirely paralyze business; will practically dispose of the credit system; will occasion great injustice and inconvenience and result in many absurdities; and if this be true, then it is the opinion of counsel for the appellants that it is within the power, and, indeed, the duty of the court to construe the law so as to avoid these results. And in that connection we remind the court of the language of Mr. Justice DAVIS in *Tiffany* v. *Lucas, supra.*

III.

DECISIONS AGAINST LITERAL CONSTRUCTION.

By section 64 of the act, subdivision 4, it is provided that:

> "Wages due to *workmen, clerks or servants,* which had been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant, are debts which have a priority."

Ordinarily it certainly could not be contended that a traveling salesman working for a salary was not a servant of his employer, or that he was not a clerk.

District Judge Evans of the District Court of Kentucky held as follows:

> "A traveling salesman employed at a salary of five thousand dollars per annum was not to be preferred to the extent of three hundred dollars under this law."

But the learned judge at the same time admitted in his opinion that according to the strict letter of the statute and according to the ordinary meaning of the word, that the employe was a servant.

In re Scanlon & Co., Vol. 2, N. B. N., 58.

District Judge Phillips of Missouri held that the manager of a mercantile corporation who receives a salary of $100 per month is not a workman or servant within the meaning of the bankrupt act who is entitled to a priority of payment out of the estate. He said:

> "Doubtless the statute had reference to a man employed on some character of work, laboring for some

other person who stands to him in the relation of employer or master."

In re Grubbs-Wiley Grocery Co., 96 Fed. Rep., 182.

In re Carolina Cooperage Co., Vol. 2, N. B. N. & R., 23, it was held that the president of a banking corporation who receives a salary of $700 per annum is neither workman nor clerk, nor servant, in the sense in which the words are used in the statute, and we quote the following from the opinion:

> "It was evidently the intention of Congress to give priority to that class of laborers who, under the laws of some states would have a lien or at least be preferred to other creditors in the settlement of an estate."

A very apt illustration of reading words into a statute by the courts under the present act, and in fact of construing the act to mean other than its literal meaning, is found in the consideration of subdivision F of section 67 of the act, by which it is provided:

> "All levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent within four months prior to the filing of a petition in bankruptcy *against him*, shall be deemed null and void in case he is adjudged a bankrupt." * * *

The court will remember that when a voluntary petition is filed under the present act the adjudication follows instanter and as a matter of course. Yet notwithstanding this language just quoted, and notwithstanding the fact that in voluntary cases the adjudication follows as of course, some courts have held that subdivision F was intended by Congress to have reference as well to volun-

tary cases. And although there are many other decisions supporting that construction thereof, we need only call attention to the opinion of Circuit Judge Jenkins, sitting in the Court of Appeals in the Seventh Circuit (the same justice who rendered the opinion in the Columbus Electric Company case) in which he declared that it was the conclusion of the court that subdivision F of section 67 has application to both voluntary and involuntary cases. We quote from his opinion:

> "But to ascertain the purpose of the law-giver we must look within the four corners of the act to gather the real purpose and intent of the law, having regard to the mischief sought to be remedied. It is difficult to see why the remedy for the supposed evil should be limited to a case of involuntary bankruptcy, for it then would be within the power of the debtor to prefer one creditor and by filing a voluntary petition anticipate and prevent an attack by other creditors through involuntary proceedings. * * * We could only assent to such a proposition when compelled by clear and precise language in the act."
>
> *In re* Richards, Vol. 2, N. B. N. & R., p. 38.

There are cases, however, holding to the contrary, and as we cite this decision simply as an illustration of the application of the doctrine we contend for, it is useless to here collate all the decisions upon that proposition.

IV.

THE DECIDED CASES.

The question to be decided by this court is one that arises in almost every bankruptcy case and has been passed upon by many referees and judges of the District Courts. There is contrariety of opinion in construing the sections of the statute involved. The first judicial expression found in any of the reports bearing upon the question is that of Judge Baker (Ind.), whose language we here quote:

> "If all payments of money made within four months prior to an adjudication in bankruptcy may be recovered from a creditor simply by showing that the bankrupt intended by such payment to cheat, hinder or delay his other creditors, it would prove a serious embarrassment to commercial transactions. No person, though believing that his debtor was solvent, and that the payment was made to him without any intent to hinder, delay or defraud his other creditors, could safely receive a payment of a pre-existing debt. A construction working such inconvenience to legitimate business *ought not to be given to the statute, unless its language is so clear and explicit as to require such a construction.*"
>
> *Blakely* v. *Booneville Bank*, 95 Fed. Rep., 267.

The particular sections here involved were not under discussion when that decision was rendered, but the language and the reasoning of the learned judge apply with great force.

The next important determination on the question arose in the Southern District of California and was decided by Referee Crowe *in re* Piper, Vol. 2, N. B. N. & R., p. 9,

and was afterwards affirmed by Judge Welborn of the Southern District Court of California. It was there determined by the referee and by the court that the word "preference" in section 57 G applied only to such preferences as were defined in section 60, and that the payment of money on account in the ordinary course of business did not come within the term "transfer of property" contained in section 60A. To the opinion of the learned referee in that case attention is respectfully called, as it contains many original thoughts and sound arguments in favor of the contention of the appellants.

The opinion of Judge Welborn, affirming the decision of Referee Crowe, will be found at the same place.

About the same time Judge Baker of Indiana, *in re* Fort Wayne Electric Ry. Co., 96 Fed. Rep., p. 803, had occasion to pass upon the question and gave to the sections involved the construction asked for by the appellees herein. At about the same time Judge Hanford, of the District of Washington, *in re* Conhain, 97 Fed. Rep., 923, decided the same question, and held that where a bank had three notes and within four months prior to the filing of a petition in bankruptcy, the bankrupt paid one of the notes and a part of the second, and the bank received the same in the ordinary course of business and without any knowledge of insolvency of the debtor or reasonable cause to believe it, such bankrupt creditor could not prove up the note upon which a partial payment had been made or the note upon which no payment had been received, unless it surrendered to the trustee all the money which it had collected from the debtor within four months prior to the day of the filing of the petition.

Meantime there had been an appeal taken from the de-

cision of Judge Baker to the Circuit Court of Appeals. At about the same time *in re* Fixen, an appeal to the Circuit Court of Appeals of the Ninth Circuit was taken to obtain the conclusions of that court upon the same question. The decision of the Court of Appeals of the Seventh Circuit in the Columbus Electric Co. case was the first delivered and was published before the Fixen case was heard by the Appellate Court in the Ninth Circuit.

Quite naturally the attention of the judges of the Circuit Court of Appeals of the Ninth Circuit being drawn to the determination of the same question by the Circuit Court of Appeals of the Seventh Circuit, the same conclusion was reached in the Ninth Circuit.

In re Fixen, 102 Fed. R., 295.

Since these decisions the question has been presented in various districts to referees and district judges, and most of them have followed the decisions which we here attack. It is true, some have stated that they did so against their own convictions and because they believed it their duty to follow the Court of Appeals.

Thereafter, however, Referee Wise, *in re* Smoke, 2 N. B. N. & R., 831, refused to follow the determination of the question theretofore announced by the Court of Appeals of the Seventh and Ninth Circuits, and he was confirmed by District Judge Brown in the following language:

> "In my judgment sections 57 G and 60 A have no reference to payments made on account of debts in the regular course of business by one who, as in this case, does not know or believe himself at the time to be insolvent and he intends no preference by such payment, even though it should afterwards appear that the debtor was at the time insolvent, and that

the payment was made within four months of the commencement of bankruptcy proceedings. The above sections (G and A) contain no time limit. The phrase '*transfer of property*' in section A is not intended to cover *such a mere payment of money in good faith and in the ordinary course of business by one believing himself solvent. Such a payment I think is not a preference.*"

In re Smoke, 2 N. B. N. & R., 996.
4 Am. Bankruptcy Rep., 434.

Thereafter and in November, 1900, Referee Hotchkiss in a very extensive, able and learned opinion reviewed the entire subject, collected all the cases *pro* and *con,* reviewed the history of bankruptcy legislation in England and America, and notwithstanding his familiarity (as indicated by his opinion) with the conclusion attained by the learned justices of the Seventh and Ninth Circuit Courts of Appeal, decided in line with the contentions of the appellants herein.

This brief, owing to the importance of the subject having already consumed much space, we refrain, much against our inclination, from incorporating herein the whole opinion of the learned referee last mentioned.

In re George W. Hall, 2 N. B. N. & R., p. 1126.

It will undoubtedly be contended by the appellee that Congress intentionally omitted from section 57 G the element of the creditor's knowledge or cause to believe, because this element was incorporated into the corresponding section of the act of 1867.

This argument we believe is best answered by the Referee Hotchkiss at page 1139, 2 N. B. N. & R., and we cannot refrain from quoting him in regard thereto:

"Much has been made of the dropping from section 57G of the element of the creditor's reasonable cause to believe, the conclusion being that by the omission Congress intended to make this all important element to the part-paid innocent debtor hereafter immaterial. Much has also been said of the transposition of certain words from section 60 a of the Torrey Bill to section 60 b of the law as passed. To my mind these changes prove the converse of what is claimed.

"That the changes may be fully appreciated, the clauses as they were in the last form of the Torrey Bill (Senate Bill No. 1035, introduced by Senator Lindsay, March 22, 1897) follow:

" 'Sec. 57 g. A creditor who has received a preference and shall have had reasonable cause to believe that it was thereby intended by the debtor to give him a preference shall not be allowed to prove his claim unless he shall surrender such preference.

"Sec. 60. Preferences.—a. A debtor shall be deemed to have given a preference if, being insolvent or in contemplation of insolvency or bankruptcy, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property with intent to (1) defeat the operation of this act; or (2) enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

" 'b. If a bankrupt shall have given a preference and the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person.'

"In passing it should be noted that all previous American bankruptcy laws under which preferences were void or voidable, after describing what consti-

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tutes a preference, in the same section and paragraph specifically give power to the assignee to proceed to avoid the same (paragraph 2, Act of 1841; paragraph 35, Act of 1867). Also that in no previous statute was the method of breaking up sections into sub-sections by 'a,' 'b,' 'c,' etc., followed; the plan adopted by the framers of the present law seems, however, to have been to set off every distinct and separate sentence as a sub-section by itself. Also that in the Torrey Bill the caption of section 60 was 'Preferences,' not 'Preferred Creditors,' a change perhaps not very material here, but indicative of the idea in the minds of those who framed the clause.

"Now, if the clauses above quoted are read carefully, (1) it will be seen that had they become the law a preference would now be substantially what it was under the law of 1867, and that (2) innocent partial payments would be no more preferences now than they had been previously either in England or this country. Section 60 a and section 60 b of that bill are the almost exact equivalent of section 35 of the act of 1867. Therefore, what was more reasonable than to eliminate from section 57 g the element of the creditor's reasonable cause to believe that it was intended thereby to give a preference, the same words being in both sections, and, on the hypothesis that section 60 a and b, like section 35 of the previous law, defined a preference, being totally unnecessary in section 57 g. This, it seems, was done. In the Henderson Bill, post, section 57 g is as now.

"That this is a fair assumption is indicated by the transposition of the time limit clause from section 60 a to section 60 b at or about the same time, a transposition which, if purposely made, and section 60 a alone is to be held the definition of preference, pre-supposes an intention on the part of Congress to give a different time limit for preferences *per se* than that established for preferences that are acts of bankruptcy [paragraph 3 a (2) (3)] or that are voidable (paragraph 60 b) or that are liens (paragraph 67 c f). In the debates attending this bill no reason

appears for such a change; in fact, the debates are all the other way. (Remarks of E. C. Brandenburg, N. B. N. Rep., Vol. II., No. 21, p. 37.)

"The sections of the Henderson Bill (Congressional Record, 55th Congress, 2d Session, pp. 2042, 2043) follow:

" 'Sec. 57 g. The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences.

" 'Sec. 60. Preferred Creditors—a. A person shall be deemed to have given a preference if, being insolvent or in contemplation of insolvency or bankruptcy he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property [with intent to (1) defeat the operation of this act, or (2)] enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

"Further, as already remarked, when Congress determined on the vital change which eliminates intent, it did it with specific words, the words above in brackets having been dropped out and the 'the effect of the enforcement of such judgment or transfer will be to' being inserted in their stead; this in conference committee in June, 1898, just before the bill was passed.

"This explanation of these somewhat mystifying changes is surely more reasonable than to impute to Congress a design by the mere transposition of words to revolutionize the modern meaning of preference, not merely by eliminating the customary four months' time limit, but by striking from it both the old element of fraud on the part of the debtor and the newer element of fraud on the part of the creditor, an explanation which imputes to the nation's law-makers the senseless purpose of creating a fraudless fraud, to the confusion of business and the lasting hurt of our credit system.

"I hold, therefore, that a preference under the law of 1898 is described, not necessarily defined, by sec-

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tion 60 a and section 60 b read together, and that he who asserts that a creditor must surrender a preference must at least show (1) insolvency of the debtor, (2) reasonable cause to believe on the part of the creditor that a preference was intended, and (3) that the result will be that one of the insolvent's creditors will obtain a greater percentage of his debt than any other creditor of the same class.

"This construction harmonizes the whole statute. It recognizes the principle, hoary-headed at the time our constitution was adopted, that payments in due course of trade, while preferences literally, are not preferences legally. It puts the creditor paid in part on an exact equality with the creditor paid in full. It draws a right distinction between the guilty creditor and the innocent creditor. It establishes a day of cleavage for distribution consistent with the rest of the statute. It relieves the courts from the necessity of reading in words to accomplish equity, and it certainly does not violate the actual words of the statute as much as that which has resulted in the construction here criticised."

As stated, the first decision to sustain the contention of appellee was that of Judge Baker, *supra*. This is a later opinion of the same judge, whose words we quoted in the Blakely case, *supra*. The learned judge reasons that under clause a of section 60, an insolvent cannot *give* a preference unless a creditor *receives* a preference. This may be true, but the court seems to overlook the fact that Congress has distinguished in sections 60 a and b between the effect of *giving* a preference and of *receiving* a preference. After quoting section 60 a Judge BAKER says:

> "The insolvent cannot give a preference unless the creditor receives it."

But he fails to note the distinction drawn by Congress between the effect of giving and of receiving under sections 60 a and b, respectively. If the debtor should give a preference under a, he is guilty of an act of bankruptcy. If the creditor should receive a preference under clause b, before it can affect his rights, *he must have knowledge of the intention of the debtor.* If reference is had to the language used in 60 a it will be seen that a person shall be deemed to have given a preference, etc. The *person* giving a preference is the subject of that paragraph and is to be affected thereby. Now, under 60 b, it will be perceived that if a bankrupt shall have given a preference within four months and the person receiving it shall have had reasonable cause to believe that it was intended thereby to give a preference, etc., then, and only in that event, are the rights of the person so receiving, affected.

Judge Baker, and later, the Court of Appeals of the Seventh Circuit, in affirming the decision of the District Court, failed to note this distinction, because they laid great stress exclusively upon section 60 a and seemed to base their opinions thereon.

In the opinion of the Court of Appeals is to be found this language:

> "The question presented is, can a creditor who has, within four months of his debtor's bankruptcy, innocently received a payment upon his debt, be permitted to prove his debt in bankruptcy proceedings and to receive from the estate of the bankrupt a dividend thereon without surrendering the preference received?"

The court then quotes section 60 a as defining a preference, and reads in connection therewith section 57 g, and seems to have overlooked the fact that if, under sections

57 g and 60 a, persons who had received payments on account, cannot prove their claims in bankruptcy on the ground that they have received a preference, that this must be so, *irrespective of the time within which these payments were so innocently received.*

In other words, if it is held that the mere payment of money under section 60 a constitutes a preference, and that that section, when read in connection with 57 g, precludes the creditor from proving his claim, why must the payment be made within the four months?

If the contention of appellee, and if the oft repeated statement of the many referees and judges of the District Court and of the court below, be true, then a person doing a credit business having at one time received the payment on account of his claim, could never prove his claim in bankruptcy against his debtor, unless he has surrendered the moneys he has collected in years gone by, if the account was a running one. This must necessarily follow if the position taken by the honorable justice who rendered the opinion in the *Columbus Electric Co.* v. *Worden, supra,* is correct, but the learned judge, in the opening statement of his opinion demonstrates that the matter could not have been clearly before the court, because he says:

> "Can a creditor who has, within *four months,* innocently received a payment, etc?"

What impressed the court that it was essential that the payments should be made within four months? Simply the fact that it was necessary to *read into* the law, as we contend should be done here, if requisite.

In section 60 b we find the express statutory enactment that knowledge or reasonable cause to believe on behalf

of the creditor is necessary before the creditor's rights can be affected.

The Circuit Court of Appeals for the Ninth Circuit, *in re* Fixen, *supra,* seems to have committed the same error as the Court of Appeals for the Seventh Circuit. The honorable justice delivering the opinion of the court in the opening paragraph of his opinion says:

> "The question to be determined in this case is, whether a payment made on account by an innocent debtor in the ordinary course of business within four months prior to his adjudication, where it does not appear that the creditor receiving payment had reasonable cause to believe that it was intended as a preference, constitutes a preference under the bankruptcy act, that will prevent the allowance of the creditor's claim for the balance of the account."

And then Justice Morrow, as did Justice Jenkins, quotes section 60 a and reads in connection therewith section 57 g, and bases the court's opinion thereon. If the honorable justice, as announced in the opinion of the court, is relying solely and only on section 60 a, read in connection with section 57 g, why, we again ask, does he lay stress on the fact that payment must be made within four months?

There is nothing in either of these sections that gives the court information. Yet, since the decision in *Columbus Electric Co.* v. *Worden, supra,* all of the judges who have passed upon this question, and all of the referees, excepting those heretofore cited by us, have held, and based their holdings on 57 g and 60 a, that moneys paid within four months, though innocently received by the creditor, constitutes a preference. If they rely on these *two* sections, why must the payment be made within four

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months? The courts have certainly looked beyond 57 g and 60 a in determining this question. They have read, in connection therewith, section 60 b and *their* conclusion of the intention of Congress, just as we here insist this court must do.

V.

In reference to the second assignment of error herein, which is to the effect that the court erred in holding that the District Court had the power and authority to order, require and compel the appellants to repay to the trustee the amount of the dividend received by the appellants, we have but to say that the appellants stand in no other or different position than if B had been paid money by or through a mistake by A. The only remedy which A would have, would be his action at law, and no court could arbitrarily make an order directing the person who had received the money to repay the same, or to deprive him of his statutory right to a trial by jury, should he see fit to demand it upon the issue. This is all the more so because by the terms of the act all suits which must be instituted by the trustee must be instituted in the State Courts, unless by consent.

"SEC. 23.—*Jurisdiction of U. S. and State Courts.*—b. Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

Respectfully submitted.

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